

Applying Theory: Negotiation

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These three assignments engage students by asking them to bring what they learn in the course to bear on real world experience. I do not necessarily use all three assignments in each class. Each assignment is followed in this handout by comments on the results or examples of student topics.

I. Reflection on a personal negotiation

[Assigned to be written after one week of class,

having been introduced to introductory overview theories of negotiation; students may revisit this assignment at the end of the term and reconsider their theoretical understanding of it. This is question 3 from the text *Negotiation Theory and Strategy*, by Prof. Russell Korobkin (2009), page 24,]

Think back to a recent negotiation in which you were involved—whether it was a business or legal negotiation, or a negotiation with a friend or family member—and try to recall specific statements made by you or the other party. Can you describe some aspects of the negotiation in terms of the categories proposed by Menkel-Meadow? That is, can you identify some aspects of the negotiation as examples of either “problem-solving” or of “adversarial” bargaining? Can you characterize the same or different parts of the negotiation in terms of Korobkin’s categories of “zone definition” and “surplus allocation”? Can you explain why the negotiation succeeded or why it failed in terms of overcoming or failing to overcome one or more of Mnookin’s categories of “barriers” to conflict resolution?

Personal negotiation reflection: examples

I posted my own answer to this question as an example to the student, as follows. A

few years ago, I bought a piano. ... Jim and Judy C. posted a note on our congregation’s listserv that they would sell their piano for a set price, and if bought by a member of our congregation, they would donate the money to the synagogue. I saw the piano, liked it, and did some research -- my piano tuner Judith P. examined it (for a fee of \$75) and told me it could be brought up to excellent condition for \$500; I looked up some information on the Steinway website (using the serial # and the dimensions of the piano I could find out the exact model and date and location when it was manufactured); I discussed what I knew about the piano with a professional pianist. I asked Judith about available quality used pianos, and she said she had been looking for one for another customer for several months and saw one Yamaha a couple months before. Trying to find other available pianos I found almost none available, and prices quite variable. I bought the piano at the requested price, and paid for moving it, as well as for moving my old piano to a church that I donated it to.

Menkel-Meadow: A Underlying needs and objectives for me was getting a good piano at a reasonable price, not disturbing a friendship, honoring their intention to donate the funds, not cheat them. Their “needs and objectives” were to find the piano a good home, fulfill a charitable pledge, be fair. My exploration of the quality of the piano by having an expert look at it and make some inquiries was OK, but bargaining about the price would not be OK, I felt. I informed them about info I learned from the Steinway website about the model and origin of their piano, which if they used in an ad (if our deal did not get done) might enhance the price they could ask.

Korobkin: I tried to get information to define the bargaining zone by checking with Steinway website, a professional pianist, and my piano technician (who I hired to look at the piano and also asked about available of quality used pianos) and by searching for comparable pianos. My BATNA was an unattractive alternative of sticking with the lousy

piano I already owned or spending considerable time and money (for the necessary inspection as to reparability of the instrument) looking for a comparable piano. I figured their BATNA was selling to a stranger, possibly for more money, but with additional effort and less emotional satisfaction.

Mnookin: the “barrier” would be uncertainty about the quality of the piano, which I overcame by having it inspected at my expense, and the other steps described above.

Students’ personal reflections were very interesting -- Some topics that students wrote about: trades before the deadline for his fantasy football team; billing dispute with a health insurer; disagreement with fiancée about what music to walk down the aisle to; overtime wages and benefits on behalf of fellow employees; reduction in rent; conference costs for a student organization; buying souvenirs in an Egyptian market; trading i-Tunes gift certificates; sales and trades on Craigslist.

II. “Current events”

Read news sources and be alert to stories about disputes or transactions that are, or could be, the subject of negotiation. Identify a story that appears to illustrate one or more aspects of negotiation that we are studying. Write a 1-2 page comment (single-spaced) explaining this connection. This is due by the end of term, and we will schedule time for these to be discussed during the final week.

some examples of topics (and my comments) from a recent year

SPORTS (College pitcher/Boras/Nationals)

You describe an impending negotiation between a desperate and very rich team owner, a renowned aggressive agent on behalf of a young and extremely talented ballplayer (actually, a pitcher...) This could shape up to be a knockdown-dragout fight. Power moves will probably dominate, the batna for the team is an unpredictable first pick of next year, and the pitcher’s batna may be good, so his RP is likely to be high. Another aspect that you could comment on is the “agency effect” -- the young man has signaled his intention to go for a high salary by hiring Boras, I think.

LABOR CONTRACTS (South African construction workers strike)

You describe a construction workers strike a few months before completion of a major project, new soccer stadiums, with a deadline looming to accommodate the scheduled 2010 World cup. Power is the main advantage for the workers, while the construction companies have deadlines, and a major economic advantage for the country that may lead to government pressure or loss of future government business. Is there a limit to the workers’ power, however, in regard to the company’s alternatives? Are there other unemployed workers who would cross the picket line? Do the union workers have the financial ability to withstand a strike? Fairness suggests that the workers should be earning at least minimum wage. Does that mean that legal norms or public opinion will help the workers?

(City of Philadelphia budget: mayor vs. unions)

You analyze ongoing contract talks as both integrative and power based. Freezing salaries makes the raises a separate issue which can be traded for other issues, as you describe it. Interesting analysis, I would have seen this as a power move, but I see the point, the raises are separated from other issues. The power issues are the voting by union members (who by regulation have to live in the city for most jobs) but on the other hand non-city worker voters are enduring high levels of unemployment, as you point out. (Plus, many of them have wage freezes and less benefits than the city workers.) All parties, you recommend, should be cautious due to significant reputational aspects.

(British Airways vs. workers)

A major airline losing money over a decade intends to lay off 18% of its employees, claiming the employees positions are due to decreased workload. (and to “outdated” practices according to the article) and the savings are necessary, while the employees want to keep their jobs and claim (what? the airline can’t function safely without them, probably). You comment that the unions may have less power than they think due to representing many individuals as opposed to a company with a unified management... What would result from the difference in cohesion between the two sides, that would be the result of unequal power? Would some workers go back to work, crossing the picket line? Are there alternative adequately trained individuals to substitute for 22,000 employees? Can managerial employees handle the jobs (probably not, I would imagine). The company could be more cohesive, possibly, but they also have a constituency, namely their investors, as well as competitors that could take their business away during a strike and potentially permanently.

CRIMINAL LAW (Plea bargain in DUI case)

An intoxicated driver kills a pedestrian. The civil wrongful death suit and criminal charges were resolved by focusing on interests of the family (for compensation), the state (for punishment of the driver and protection of the public), and the driver (for freedom from incarceration). The decedent was acknowledged to be negligent, as well, giving the prosecutor an uncertain batna re outcome at trial, helping persuade all to go with a deal. You mention the driver’s “cooperation” B I think we could call this a psychological issue, that his remorse and assistance (if that’s what you mean) made the family of the deceased feel like accepting a deal (the family of a victim doesn’t control what the prosecutor does, but for reputational reasons most prosecutors care about this). Interesting analysis of the power issues that each party brought to the table (money, possible incarceration, consent to settle a lawsuit, right to make a victim impact statement).

III. Personal assessment and goals for improvement

During the first week of the term, look over the syllabus and note the various topics we will be examining... Write a short note, 2 to 1 page is fine, about an aspect of negotiation you anticipate that you will find challenging to perform, and what you think you will find relatively easy, among these topics. Do not turn this assignment in; save it for future reference. At the end of the term, you will retrieve it and add a page assessing your predictions, and describing what you plan to continue to work to improve as you practice law. You may wish to improve what you perceive as a weakness, or you may wish to concentrate on becoming excellent at some aspect of negotiation that you have decided you have a good feel for, you can decide this later. These papers will be turned in at the end of the term. You will also be encouraged, but not required, to post these on the course webpage, and may get some helpful feedback from your classmates, and we may have some opportunity to discuss these comments in class.

Results of personal reflection papers

Many students reflect on their personal skill, fortitude, tolerance, for the kinds of behavior they anticipate will be necessary for successful negotiations. They are often very insightful about their abilities, making correct predictions. They are also often worried that while they will be honest, other students will not hesitate to misrepresent facts; while they will be cooperative, others will be adversarial. These become interesting themes to return to during the term. This assignment also results in students reading the syllabus during the first week of class!

Micro-Lawyering in a Doctrinal Course: Wills, Trusts, and Estates

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The idea behind micro-lawyering is to give law students opportunities to use their budding legal skills in a real-life (albeit small) situation. Although these opportunities may occur more naturally in the clinical setting, they can also be integrated into both skills and doctrinal courses. There are several challenges, however, in integrating these experiences.

One challenge is to remain within unauthorized practice of law limitations. Unlike the clinical context where a licensed attorney may oversee the work of law students, most traditional law school classes do not have this support system in place. One way to resolve this difficulty is to have students serve themselves, such as drafting a document for their own benefit. That is the approach taken in the model exercise described below. Another way is to have students serve in a role that is not the attorney, but still requires the use of legal skills and concepts, such as by serving as a trustee or other fiduciary (I use this approach in my Estate & Trust Administration class).

Another challenge to micro-lawyering is assessment. Unlike class components relating primarily to substantive knowledge, practice simulations and micro-lawyering alike rely upon demonstration of legal skills. They are therefore harder to grade as “right” or “wrong.” One solution to this challenge is to use a grading rubric which allows the student and professor to hone in on the skills being developed and demonstrated and where a student’s performance falls along the range of potential achievement.

The following is an example of a micro-lawyering exercise to be used in an upper-level required doctrinal course. It includes both a description of the project itself – a student is required to draft his or her own will – and a form used to assess student performance on the project.

Wills, Trusts & Estates -- Drafting Project: Your Last Will and Testament

In this exercise, you will put your estate planning skills to use by drafting your own will. The purpose of the assignment is to gain experience working with an estate planning document and to develop basic legal drafting skills. Putting the theories we discussed in class into practice should also help you gain a broader perspective. **Please read through all of the instructions for the assignment carefully.** If you use this assignment as the basis for a will you choose to complete and execute, that would be a happy side effect, but you are *not required* to execute the will that you draft.¹ Please *do not sign* the will you draft for this class project before you submit it for a grade, as your intent to execute it would be arguable given the circumstances. If you do wish to execute your will, please wait until you receive my feedback (and abstain from skydiving until then), make any changes you would like, and then execute a clean copy.

How do you draft a will? There are a few places to start. First, you could start from scratch – just write the will yourself. That is what many of the testators in our book did (particularly

¹ If your estate or family situation is complex, you should probably consult an expert rather than relying upon a will you drafted. That said, as long as you are better off after executing your will than before (for many of you, intestacy), you can always execute a better will later... until, of course, the final DEADline.

those with holographic wills). I do not advise this approach. At the other end of the sophistication spectrum, you can use a document assembly system, as we examined in our web conference earlier this semester. That you will have to do on your own dime. Finally, you can start with a form and then edit it to meet your needs. That is what we will do in this exercise and still the primary way many practicing attorneys draft wills.

For now, we are working from model forms, which are currently posted on TWEN.² Review both model will documents posted on TWEN and select one to download and use as a form to draft your own last will and testament. One model document was generously provided by Andrew Potts at Baker Donelson in connection with a Cumberland CLE a few years back. The other model document is based primarily upon my own will, which I drafted using Choate, Hall & Stewart model forms. You are also encouraged to locate additional samples of model will forms, many of which are available in state-specific practice manuals available on Lexis and Westlaw. You should use these additional models to enhance your sense of the variety of approaches, and you may integrate language from additional models into your will. However, **you must use one of the two forms posted on TWEN** as the starting point for your will for the purposes of this project.

To draft your will, select one of the model forms and read it thoroughly.

Edit all portions in bold AND all other portions you would like to change to tailor the document to YOUR preferences. *Be sure to draft (1) a provision disposing of specific items of tangible personal property and (2) a provision disposing of the residue of your estate.* As you edit, take out the bolding and the instructions. In the final version of the document, you should have no bolding and no instructions, but just a completed will.

Throughout the document, edit the pronouns and similar references to reflect your gender and the gender of your beneficiaries. Remove or add any references to a spouse depending upon your personal marital status. When identifying beneficiaries for the first time, use their full name if possible, and note either (1) their familial relationship to you or (2) their home town and state. Feel free to leave property to individuals who very well may not survive you (like your parents); just name alternate takers and be prepared to revise your will as circumstances change.

You may not have much in the way of property right now, but that may change. Your will should cover the disposition of property that you have now, and provide a plan that makes you comfortable for disposing of unforeseen assets. Do not include directions disposing of specific items of property that you do not own, but DO include directions for broad categories of assets that you may later own (real estate, the residue). As you accumulate property and undergo major life changes (employment, marriage/divorce, birth of children, death of close relatives, etc.), you should revisit your estate plan and make sure it is still compatible with your circumstances. As a general rule, you should reconsider your estate plan at least every five years, as well as in connection with major life events.

² The model documents are not to be distributed, either before or after you have edited them. They are for your personal use in completing this academic exercise.

Wills, Trusts & Estates – Will Drafting Exercise Grading Sheet

Student Name: _____

Points (out of 10): _____

Drafting Clarity

Was the language chosen by the student clear and straightforward? Could an executor with no information beyond that provided in the will accurately carry out the terms of the will? Is the will free from ambiguity?

0

1

2

3

Thoroughness

Does the dispositive plan thoroughly convey all of the student's property, including property to be acquired after execution of the will? Does the will provide for alternate takers in case named beneficiaries fail to survive the testator? Does the will name an executor and an alternate, and a guardian and alternate, if appropriate? Are the execution, attestation, and notarization provisions sufficient?

0

1

2

3

Creative and Analytical Thought

Does the will reveal that the student formed an underlying plan for the disposition of his or her assets? Is it clear that the student thought about what he or she owned and who should receive it?

0

1

2

Responsiveness

Did the student complete the assignment as directed? Did he or she follow directions appropriately?

0

1

2

Public Speaking For Lawyers¹

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Course Objective

This course examines public speech from both a historical and theoretical perspective, as well as provides students with practical opportunities to develop a skill-set heavily relied upon by attorneys from all practice backgrounds.

Whenever lawyers speak professionally, they are engaging in some form of oral advocacy. This is true inside the courtroom, but is equally true in nonlitigation settings—whether speaking to lay groups about various matters of legal controversy; appearing before legislatures, city councils or municipal boards; pitching to colleagues, clients or potential clients; or conducting media interviews for any variety of reasons.

The course will examine traditional oral advocacy theories but will also explore communication and interdisciplinary theories and mechanics/strategies needed for effective persuasive public speaking like speech study, audience analysis, outlining, documentation, organizational skills, word choice, and presentation. Every speech, including the one of self-introduction, will focus on topics that are legally relevant. Throughout the semester, students will maintain files of articles regarding a legal topic (i.e. legal arguments and theories behind controversial social issues) from which many of their speeches will be derived, including the persuasive speech.

One of the primary methods of learning to improve your public speaking skills comes from your ability to learn and grow from audience reaction and critique. As a result, your classmates, in giving you feedback as a speaker, will be the primary source of your improvement plan.

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Assignments

- **Extemporaneous Files**
 - Starting at the beginning of the semester, students will be expected to maintain two files on the course webpage filestore on issues chosen by the student during the first week of classes (one of which is the issue described in the student’s self-introduction speech.) Each student will be expected to collect articles regarding their given topics and to post a *minimum* of two stories per week, per issue. These articles should endeavor to provide various “sides” of a legal issue, i.e., legal theories underlying the fight for/against gay marriage.
 - All students should endeavor to familiarize themselves with the articles/content of the all of the extemporaneous files.

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¹ This is an excerpt of the syllabus for the class. As you can see, the focus is on the maintenance of the current events, or “Extemporaneous” files on which the student’s classmates will give a persuasive argument. Other students, who function as the audience, then provide the speaker with feedback through the “Speech Evaluation” template, also included in these materials.

- **Speeches**
 - **Persuasive Extemporaneous Speech Using a Prepared File**
 - **Description:** On the day of the extemporaneous speech, the student will be randomly assigned a pro/contra position on one of the topics maintained by your classmates. The goal with this speech is to begin to develop the skill of persuading those who *may disagree with you*. You are expected to be familiar with all of the topics and the various positions associated with them. Read the articles posted by your classmates throughout the semester in the Legal Issues folders. You won't get the topic you've been maintaining. You will have 30 minutes to prepare your persuasive speech using the filestore articles (and any other information you can uncover in that period of time).
 - **Length:** 30 minutes to prepare using the filestore; 8-10 minute speech.

SPEECH EVALUATION FORM

This is a template that you should follow in writing your self and peer evaluations. **Remember, these evaluations will be provided anonymously to the speaker. Please make them constructive, relevant and respectful.**

CONTEXT

Have you identified the context of the speech?

- Consider the rhetorical situation:
 - *Did the speaker adequately tailor the speech to the listeners' knowledge level?*
 - *Were the speaker's ideas and supporting material interesting and effective for the specific audience?*
 - *Did the speaker understand current attitudes, beliefs and practices regarding the issue?*
 - Consider the speaker's purpose:
 - *Has the speaker identified his/her purpose to the speech in a BLUF way?*
 - *How well did the speaker achieve this purpose?*
 - *Effectiveness*
 - *Artistic Aesthetic*
-

OPENING, TOPIC, BODY AND CLOSING

- Opening:
 - *Gained audience's attention/Secured goodwill for the speaker*
 - *Thesis/topic was appropriately identified*
 - *Delivered a roadmap/preview of topic and main points*
 - Topic:
 - *Appropriate for speaker/Appropriate for audience*
 - *Appropriately adapted to the assignment*
 - Closing
 - *Focuses on the central idea*
 - *Offers a creative reiteration of the main points in the speech*
 - *Conveys sense of completeness/finality*
 - *Leaves audience satisfied*
-

ORGANIZATION/OUTLINE

- Speech is organized around one central, overarching purpose (i.e. to inform on the topic, to persuade the audience to adopt a viewpoint or to motivate the audience to take action)
- Contains identifiable beginning, middle and end
- Organization includes appropriate main points
 - *Purpose of each major section is clear*

- *Type of organization is identifiable (topical, problem-solution, cause-effect, pro v. con, chronological, etc.)*
- *Contains effective transitions between sections*

RESEARCH/SUPPORTING MATERIAL

- Where appropriate, speech referenced credible research and support that was consistent with audience expectations and speaker purpose
 - *Ethos/credibility on the topic was developed*
 - *Evidence was used to support ideas*
 - *Ideas were made clearer and more relevant as a result*

PERSUASION

- Has the speaker properly employed the rhetorical concepts of ethos, pathos and logos?
 - *Logos—did the material coalesce? Was there a rational, logical and understandable message and argument?*
 - *Pathos—was an emotional appeal properly utilized? What was the emotional appeal? Was it appropriate for the target audience?*
 - *Ethos—did the speaker evince good will, candor, truthfulness, zeal, professionalism?*
- Did the speaker have an identifiable organization to the material? Was it a problem-solution organization, Monroe's Motivated Sequence, a combination or something else?
 - *Was the context and the problem properly identified? Did the speaker use statistics and data presented in an informative but persuasive manner?*
 - *Was the solution provided and argued for?*
 - *What type of reasoning did the speaker utilize?*
 - *Was the solution sufficiently intricate or complex to match the intricacy or complexity of the problem?*
 - *Did the speaker use vivid imagery?*
 - *Was the audience given specific instructions on what the speaker expected of them?*

MECHANICS

- Speaker's Presence:
 - *Speaker is developing his/her own version of "Star-Presence"*
 - *Speaker adopted a natural, authentic, and appropriate-for-the-occasion speaking "role"*
 - *Speaker displayed warmth, responsiveness, authenticity/integrity, transparency/vulnerability*
 - *Holistically, speaker displayed appropriate confidence*
 - *Speaker properly channeled nervous energy*
 - *Speaker was "audience aware"*
 - *Speaker "connected" with the audience*
 - *Speaker "envisioned success" (for self evaluations)*
- Vocal Delivery; Eye contact; Unobtrusive use of notes; Appropriate animation; Poise/Stance; Gestures; Language use (word choice appropriate to purpose and audience, proper grammar, inclusive language, defined key terms)

AUDIENCE ANALYSIS (Where appropriate)

- Does it seem as though the speaker engaged in appropriate audience analysis?
 - *In tailoring her/his remarks, speaker considered audience factors such as size, age, educational level, heritage, customs, economic status, group affiliations, real-life experience, values, beliefs, attitudes, socio-political leanings, as well as audience expectations and needs*